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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 220.

JOVITA PEP[illegible],
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF.

JOHN G. LERCH,
Counsel for Petitioner.

PREW SAVOY,
DAVID A. GOLDEN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

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OCTOBER TERM, 1948.

No. .

JOVITA PEREZ,
Petitioner,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Customs and Patent Appeals.

Petitioner, Jovita Perez, prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in *The United States* v. *Jovita Perez,* Customs Appeal No. 4588, entered March 1, 1949 (timely petition for rehearing denied by the United States Court of Customs and Patent Appeals on May 2, 1949), reversing a judgment of the First Division (Appellate Term) of the United States Customs Court rendered November 10, 1947, which modified a judgment of the trial court of the United States Customs Court rendered October 3, 1946.

STATEMENT.

Section 501 of the Tariff Act of 1930 as amended (U. S. C. Title 19, Section 1501, 46 Stat. 708), (Appendix I), grants to importers the right to judicial

review of the decisions of appraisers of customs in appraising imported merchandise.

Section 402(f) (U. S. C. Title 19, 46 Stat. 708), (Appendix II), provides the method of determining "cost of production" of imported merchandise where that basis has been decided to be the correct basis for applying ad valorem rates of duty.

T. D. 48860 (Treasury Decisions, Volume 71, page 431), (Appendix III), is a ruling by the Commissioner of Customs in which he attempts to define and prescribe a method of applying the item of "profit" in figuring "cost of production" of imported merchandise. It is the contention of petitioner that this ruling is contrary to the statute. We quote from T. D. 48860:

> * * * the "profit which is ordinarily added in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same general trade as the manufacturer or producer of the particular merchandise under consideration," is the usual difference between the manufacturers' or producers' selling prices of such merchandise of the same general character and all costs and expenses incurred by such manufacturers or producers in connection with such merchandise.

It is the further contention of the petitioner that the above ruling, "If merchandise of the same general character as the particular merchandise under consideration and otherwise within the terms of paragraph (4) is sold for home consumption in the country of production the usual profit *realized* from such sales

is the profit to be added," also contravenes the statute. (Italics added.)

Petitioner imported a certain flavoring syrup called "El Masco," from Mexico. It was entered at a value of $167.06 for a unit of six barrels. The appraiser, by applying the illegal regulation (T. D. 48860), advanced the value to $215.16 for the unit.

Petitioner filed an appeal to reappraisement by the United States Customs Court under Section 501 of the Tariff Act of 1930, as amended. It was stipulated that the proper basis of appraisement was the statutory cost of production and all elements of cost of production, except the item of profit were also stipulated. The issue, therefore, is narrowed to the proper determination of "the profit which ordinarily is added * * * by manufacturers * * *" within the meaning of Section 402(f).

It is claimed by petitioner that the profit applicable herein (paragraph 4 of Section 402(f)) is $44. or 44.59 per centum of subparagraphs (1) and (2) of said Section 402(f) which is the "profit ordinarily added * * *". The appraiser in following T. D. 48860, *supra*, which defines the profit as "the usual difference between the manufacturer's or producer's selling prices * * * and all costs and expenses incurred * * *," found the profit to be $99.25 or 98.15 per centum for a unit of six barrels.

Had the appraiser determined "the profit which is ordinarily added * * * by manufacturers * * *" as he was required to do under the statute, he probably would have arrived at the same figure as that claimed by the petitioner herein. Instead he followed the extralegal method prescribed by the regulation T. D. 48860, *supra*.

Jurisdiction.

The judgment of the United States Court of Customs and Patent Appeals was entered March 1, 1949 (R. 128). Petition for rehearing, timely filed under the rules of that Court, on March 23, 1949, was denied on May 2, 1949 (R. 128). The jurisdiction of this Court is invoked under Section 195 of the Judicial Code, as amended (U. S. C. Title 28, Sec. 1256).

Questions Presented.

(1) What is the addition for profit * * * equal to the profit which ordinarily is added * * * by manufacturers * * * in determining cost of production under Section 402(f) of the Tariff Act of 1930?

(2) Did the Secretary of the Treasury exceed his powers in promulgating T. D. 48860?

(3) Did the United States Court of Customs and Patent Appeals correctly apply Sec. 402(f) of the Tariff Act of 1930, in determining cost of production of "El Masco"?

Reasons for Granting the Writ.

1. The question presented in this case involves an important question of Federal law which is of considerable importance to a large number of importers, which has not been, and should be, settled by this Court.

During World War II and since, "cost of production" as a basis of appraisement to determine the value of imports has become of increasing, and of great importance in the administration of the tariff laws.

The guide for importers and appraisers, for determining "cost of production" is Treasury Decision 48860, despite the fact that in theory and in application, it is contrary to the express language of Sec. 402(f). The Court of Customs and Patent Appeals applied this Treasury Decision in its acceptance of the substance of Government Exhibit 6, and that decision will henceforth be followed by appraisers, unless corrected by this Court.

The statute specifically provides that, to determine cost of production, in order to determine the duty, appraisers shall *add*:

1. Cost of labor and materials.
2. Usual and general expense.
3. Cost of packaging.
4. An addition for profit, * * * equal to the profit which ordinarily is added * * * by manufacturers * * *.

T. D. 48860 requires that the opposite be done. From the selling price, the appraisers *deduct,* non-dutiable

charges, materials and labor, usual and general expense, and cost of packaging. The balance is called "realized profit" and is added back to determine the value on which to base the duty.

This is United States value as defined in Section 402(e) under a different name, since the selling price includes the duty, which is the element sought to be determined *after* "cost of production" has been determined. Yet, the parties and the Courts below are in agreement that there is no United States value, a requirement under Section 402(a)(3) of the statute before "cost of production" may be used as the basis for appraisement (Brief, p. 20).

Because many thousands of importations are being, and will be, affected by T. D. 48860 and the decision below, a decision of this Court giving effect to the express language of the statute is required.

2. THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The term "an addition for profit * * * equal to the profit which ordinarily is added * * * by manufacturers * * *" was used in its ordinary and accepted sense. Congress may be presumed to have known that the usual management practice is to make an addition for profit in computing the selling price, when it used this simple language (Appendices IV and V).

The trial court and appellate court gave full recognition to known business practices, whereas, in reversing, the Court of Customs and Patent Appeals ignored it.

Furthermore, in substituting its opinion for that of the trial court, the Court of Customs and Patent Appeals went beyond its appellate jurisdiction.

In order to discard the evidence produced by the importer as to the addition for profit made by the witness, Walter Mack, the Court below had to ignore usual business practices, accepted by the Court below. Also, it had to find a "realized profit," which could not exist. There could be no "realized profit" on the first unit of "El Masco" imported, as the trial court found. Thus, the Court of Customs and Patent Appeals acted as a trial court and exceeded its power of review in reversing the appellate court.

Conclusion.

It is respectfully submitted that the Petition should be granted.

John G. Lerch,
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David A. Golden,
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IN THE

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No. .

JOVITA PEREZ,
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THE UNITED STATES,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States Customs Court (R. 143) is reported in R. D. 6402, Vol. 17, U. S. Customs Court Reports, page 331. The opinion of the United States Customs Court, First Division (R. 161) is reported R. D. 7432, Vol. 18, U. S. Customs Court Reports, page 292. The opinion of the United States Court of Customs and Patent Appeals (R. 178) is reported as C. A. D. 407, weekly Treasury Decisions of May 12, 1949, Volume 84, No. 19, page 13.

Jurisdiction.

Petition, page 4.

Statutes and Treasury Decision Involved.

Tariff Act of 1930

Sec. 501, as amended. This section will be found in Appendix I.

Sec. 402. This section will be found in Appendix II.

T. D. 48860.

This Treasury Decision will be found in Appendix III.

Statement of the Case.

Petition, page 1.

Specification of Errors to Be Urged.

The United States Court of Customs and Patent Appeals erred:

1. In applying in substance T. D. 48860, which is contrary to, and in extension of, the express language of Sec. 402(f) of the Tariff Act of 1930.

2. In holding that the "addition for profit" of the first unit of "El Masco" imported, required by the statute, is the "profit realized" by application of the arbitrary method of computation provided by T. D. 48860.

3. In failing to hold that there was no realized profit upon the importation of the first unit of "El Masco" manufactured.

4. In failing to hold that the addition for profit * * * equal to that which ordinarily is added * * * by

manufacturers * * *, required by the statute, is the addition for profit added by manufacturers in computing the selling price.

5. In failing to hold that the "addition for profit" of the first unit of "El Masco" imported *"equal to the profit which ordinarily is added * * * by manufacturers * * *"* was $44.00, as found by the United States Customs Court, First Division.

6. In reversing the decision of the United States Customs Court, First Division.

ARGUMENT.

1. The Secretary of the Treasury exceeded his powers in promulgating T. D. 48860.

The Secretary of the Treasury has unquestioned power to issue regulations, as a guide to Customs Appraising Officers or others, to construe ambiguous language, and generally to carry out the purposes of the statutes being administered by his department.

However, he is not empowered to issue regulations contrary to specific language of an Act of Congress, or in extension, or amendatory, of an Act of Congress. Nor is he empowered to issue regulations which are tantamount to legislation. *Koshland* v. *Helvering*, 298 U. S. 441, 447; *Miller* v. *United States*, 294 U. S. 435, 439-440; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610; *Lynch* v. *Tilden Co.*, 265 U. S. 315, 320-322; *Morrill* v. *Jones*, 106 U. S. 466, 467; *United States* v. *200 Barrels of Whiskey*, 95 U. S. 571, 576.

Here, as in *Koshland* v. *Helvering, supra,* "* * * where * * * the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation."

In the case of *Miller* v. *United States, supra,* the Court held a regulation invalid "because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the act, it is not, in the sense of the statute, a regulation at all but *legislation.*" (Italics added.)

The subject statute provides for value to be determined from foreign value, export value or United States value. If they do not exist, then "cost of production" is to be used. "Cost of production" is a specific statutory formula, consisting of the addition of four elements: raw materials and labor, usual and general expense, packaging and an addition for profit equal to the profit which ordinarily is added.

Unusual expenses, such as temporary export taxes, unusual fees, etc., do not go into this formula; yet, they come out of profit.

The formula being specific, there is no authority for the administration to substitute another formula, or having determined that there is no United States value, to use that formula to determine cost of production, in lieu of the formula contained in the law. T. D. 48860 does this very thing.

T. D. 48860 starts with the selling price, which includes duty, the very thing which is sought to be established under Sec. 402(f). Then, after deducting non-dutiable charges, including duty, and the first three elements of the statutory formula, the balance

is held to be profit. This approach is legislation in every sense, beyond the powers of the Treasury Department and is invalid. *Lynch* v. *Tilden Co., supra; Miller* v. *United States, supra,* as the trial court held in the subject case.

2. The addition for profit * * * equal to the profit which ordinarily is added is the profit which was added by the manufacturer of "El Masco".

"An addition for profit * * * equal to the profit which ordinarily is added * * * by manufacturers * * *" means—and can mean only—the gross profit which is ordinarily added *after* raw material, direct labor, usual and general expense and packaging have been determined.

Certainly, Congress can be deemed to have known the normal way the majority of business men compute selling price, as their method is well known (App. IV and V), particularly when Congress adopted the very formula which the majority of businessmen use.

"The majority of companies do their pricing by a formula which takes into account on a percentage basis raw material, labor, overhead, sales expense, trade discounts and profit" (Pricing Policies, Dartnell Management Methods Research—Report 572).

In Appendices IV and V the Court will find the price formula in current use by various types of manufacturers. A mere scrutiny discloses it to be the formula of the statute and the very formula used by Walter Mack, in determining the selling price of "El Masco".

Mack had made a three-year arrangement for the

purchase of sugar in Mexico, subject to the approval of the United States (Tr. 25). He computed his costs (Tr. 26-28) and "included in the selling price approximately $44.00 as profit" (Tr. 29).

The United States Court of Customs and Patent Appeals was concerned with the value of this computation of selling price, because made several months before the manufacture of "El Masco", due to the fact that the Court missed a salient point not missed by the trial judge, who heard the witness.

"El Masco" is the name given to the product of sugar and other ingredients, produced in Mexico and imported into the United States, for use in the manufacturing and bottling in the United States of the beverage known as "Pepsi Cola" (Tr. 25-27).

Sugar costs represent 75 per cent of total costs of "El Masco", other ingredients 11 per cent, direct labor 1¼ per cent, usual and general expense 8¼ per cent and packaging 4½ per cent (Tr. 100).

The sugar had been contracted for. Other ingredients, the Pepsi-Cola Company had been supplying for years. Usual expenses and packaging costs are known by experience. Only duty and variable labor costs were unknown. Excluding duty which could not be known and is not yet known, there remained as a pure estimate only direct labor costs, which could be only a fraction of 1 per cent.

The record shows that the manufacturer of "El Masco" thus computed selling price, upon the basis of *known facts* which did not change months later, in accordance with the statute, both of which accord in every way with usual business methods.

3. The United States Court of Customs and Patent Appeals erred in reversing the appellate court in its application of Section 402(f) of the Tariff Act.

The Court erred in following the substance of T. D. 48860, since that Treasury Decision is invalid (Cases, *supra* 11).

The Court erred in failing to give to the statutory language the ordinary meaning of the words thereof. *United States* v. *Isham,* 17 Wall. 496; *United States* v. *Merriam,* 263 U. S. 179; *Hartranft* v. *Wiegmann,* 121 U. S. 609, 616.

The Court erred in failing to give to the words "an addition for profit * * * equal to the profit which ordinarily is added * * * by manufacturers * * *" the meaning which they have to the average business man, with respect to whom Congress legislated. (*Supra* 13).

The Court erred in substituting its evaluation of the testimony of Walter Mack, for that of the trial court. In so doing, the Court exceeded its appellate power.

The function of the trial court was to weigh the evidence and apply the clear words of the statute thereto. The function of the appellate court was to decide whether there was substantial evidence to support the finding made by the trial court and whether the correct rule of law had been applied.

While the Court below said that the findings of the trial and appellate courts lacked substantial evidence, actually, the Court below weighed the evidence and substituted its opinion respecting its weight for that of the trial court. Its error in ultimate conclusion was due to the fact that the Court had no knowledge

of, or ignored, business practices, failed to give proper weight to the manufacturing cost data (Tr. 99-100), when considered in conjunction with Walter Mack's testimony (Tr. 25-29), and failed to apply the clear language of the statute to the uncontradicted evidence. Had the Court applied the statute, instead of T. D. 48860, and noted the data available to Mack, when he computed the selling price of "El Masco", it could not have rejected his testimony. In doing so, the Court went beyond its powers of review, despite all that that Court has said to the contrary respecting the scope of its power of review. Cf. *United States* v. *F. S. Allenby & Co.*, 20 Cust. & Pat. App. 80; *United States* v. *R. R. Rogers Chemical Co.*, 18 Cust. & Pat. App. 45; *United States* v. *Wheeler, Elder & Elder*, 17 Cust. & Pat. App. 279; *May Co.* v. *United States*, 17 Cust. & Pat. App. 190.

The errors of the Court below will affect many thousands of importers unless its decision is reversed in this case.

CONCLUSION.

It is respectfully submitted that the decision below should be reversed.

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DAVID A. GOLDEN,
Of Counsel.

APPENDIX I.

SEC. 501. NOTICE OF APPRAISEMENT—REAPPRAISEMENT.

(a) The collector shall give written notice of appraisement to the consignee, his agent, or his attorney, if (1) the appraised value is higher than the entered value, or (2) a change in the classification of the merchandise results from the appraiser's determination of value. The decision of the appraiser shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed with or mailed to the United States Customs Court by the collector within sixty days after the date of the appraiser's report, or filed by the consignee or his agent with the collector within thirty days after the date of personal delivery, or if mailed the date of mailing of written notice of appraisement to the consignee, his agent, or his attorney. No such appeal filed by the consignee or his agent shall be deemed valid, unless he has complied with all the provisions of this Act relating to the entry and appraisement of such merchandise. Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the United States Customs Court and shall be assigned to one of the judges, who shall in every case, notwithstanding that the original appraisement may for any reason be held invalid or void and that the merchandise or samples thereof be not available for examination, after affording the parties an opportunity to be heard on the merits, determine the value of the merchandise from the evidence in the entry record and that adduced at the hearing. Reasonable notice shall be given to the importer and to the person designated to represent the Government in such proceedings of the time

and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. In finding such value affidavits and depositions of persons whose attendance can not reasonably be had, price lists and catalogues, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government may be admitted in evidence. Copies of official documents, when certified by an official duly authorized by the Secretary of the Treasury, may be admitted in evidence with the same force and effect as original documents. The value found by the appraiser shall be presumed to be the value of the merchandise and the burden shall rest upon the party who challenges its correctness to prove otherwise.

(b) The judge shall, after argument on the part of any of the interested parties requesting to be heard, render his decision in writing together with a statement of the reasons therefor and of the facts on which the decision is based. Such decision shall be final and conclusive upon all parties unless within thirty days from the date of the filing of the decision with the collector an application for its review shall be filed with or mailed to the United States Customs Court by the collector or other person authorized by the Secretary of the Treasury, and a copy of such application mailed to the consignee, or his agent or attorney, or filed by the consignee, or his agent or attorney, with the collector, by whom the same shall be forthwith forwarded to the United States Customs

Court. Every such application shall be assigned by the court to a division of three judges, who shall consider the case upon the samples of the merchandise, if there be any, and the record made before the single judge, and, after hearing argument on the part of any of the interested parties requesting to be heard, shall affirm, reverse, or modify the decision of the single judge or remand the case to the single judge for further proceedings, and shall state its action in a written decision, to be forwarded to the collector, setting forth the facts upon which the finding is based and the reasons therefor. The decision of the United States Customs Court shall be final and conclusive upon all parties unless an appeal shall be taken by either party to the Court of Customs and Patent Appeals upon a question or questions of law only within the time and in the manner provided by section 198 of the Judicial Code, as amended.

(c) If upon the hearing of a protest, the United States Customs Court shall declare an appraisement of merchandise made after the effective date of the Customs Administrative Act of 1938 to have been invalid or void, it shall remand the matter to a single judge, who shall proceed to determine the proper dutiable value of such merchandise in the manner provided for by this section. In such proceeding no presumption of correctness shall attach to the invoice or entered values.

APPENDIX II.

SEC. 402, VALUE.

(a) Basis.—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

* * * *

(f) Cost of Production.—For the purpose of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

APPENDIX III.

T. D. 48860.

Antidumping Act of 1921—Cost of Production

Interpretation of the terms "usual general expenses" "profit" in section 206, Antidumping Act of 1921.

Treasury Department,
Office of the Commissioner of Customs,
Washington, D. C.

To Customs Appraising Officers and Others Concerned:

The Bureau has been asked to rule that the terms "usual general expenses" and "profit which is ordi-

narily added", as they appear in section 206 of the Antidumping Act of 1921 (U. S. C. title 19, sec. 165), contemplate only expenses and profit which may be attributed to the creation of merchandise, and not those attributable to its distribution and sale. The statute in question reads:

> Sec. 206. Cost of Production.—That for the purposes of this title the cost of production of imported merchandise shall be the sum of—
>
> (1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing, identical or substantially identical merchandise, at a time preceding the date of shipment of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;
>
> (2) The usual general expenses (not less than 10 per centum of such cost) in the case of identical or substantially identical merchandise;
>
> (3) The cost of all containers and coverings, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and
>
> (4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) equal to the profit which is ordinarily added, in the case of merchandise of the same general character as the particular mer-

chandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same general trade as the manufacturer or producer of the particular merchandise under consideration.

After a careful consideration of the terms of the statute, its legislative history, and pertinent judicial decisions, the Bureau has reached the following conclusions:

(1) The "cost of production" contemplated by the statute is a constructive "foreign-market value" as the latter term is defined in section 205 of the Antidumping Act of 1921 (U. S. C. title 19, sec. 164).

(2) The "usual general expenses" contemplated by paragraph (2) of section 206 are all of the *usual* expenses incurred by the manufacturer or producer of the particular merchandise under consideration in connection with the creation, storage, sale, and distribution of merchandise which is identical or substantially identical with the particular merchandise under consideration except those usual expenses which are covered by paragraphs (1) and (3) of such section.

(3) Under paragraph (4) of section 206 the "profit which is ordinarily added in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same general trade as the manufacturer or producer of the particular merchan-

dise under consideration", is the usual difference between the manufacturers' or producers' selling prices of such merchandise of the same general character and all costs and expenses incurred by such manufacturers or producers in connection with such merchandise.

Whether reported expenses are "usual" or extraordinary is in each case a question of fact to be determined by appraising officers in accordance with the same principles which govern their determination of "usual wholesale quantities" and "ordinary course of trade" for the purposes of section 402 of the Tariff Act of 1930. Since the purpose of section 206 is to determine a "foreign-market value" as defined in section 205 of the antidumping act, the usual expenses incurred with respect to identical or substantially identical merchandise sold for home consumption should be used if the facts support a determination of such expenses. If identical or substantially identical merchandise is not sold for home consumption in the country of production the usual expenses incurred with respect to identical or substantially identical merchandise exported to third countries should be used and if this in turn is not available the expenses incurred with respect to the merchandise imported into the United States must be adopted.

The addition for profit contemplated by paragraph (4) of section 206 is also a question of fact in determining which appraising officers are authorized by section 209 of the antidumping act (U. S. C. title 19, sec. 168) to ascertain or estimate the amount by all reasonable ways and means. If merchandise of the same general character as the particular merchandise under consideration and otherwise within the terms of paragraph (4) is sold for home consumption

in the country of production the usual profit realized from such sales is the profit to be added. In the absence of such sales, profits from sales to third countries or to the United States must be considered in turn.

If the ascertained sum of all the usual general expenses under paragraph (2) of section 206 is less than 10 percent of the total ascertained sum under paragraph (1) of such section, such 10 percent will be taken as the total sum of the "usual general expenses". The sum to be added under paragraph (4) shall in no case be less than 8 percent of the sum of the amounts found under paragraphs (1) and (2). The 10-percent clause in paragraph (2) and the 8-percent clause in paragraph (4) are in no case to be invoked otherwise than to establish the minimum sum of the "usual general expenses" or the minimum addition for profit as the case may be.

EXHIBIT NO. 1 PRICING FORMULAS IN CURRENT USE

Type of Manufacturer	Raw Material	Labor	Overhead	Sales Expense	Discounts	Profit
Business forms	60		10	25	none	5
Clothing, hospital	47	16	19	14	none	4
Electric appliances	29	7	8	3	40	13
Farm equipment	59.2	16.4	19.9	2.5	none	2
Food	45	15	10	20	(Traffic 7)	3
Health products (direct)	17.5		11.7	55	none	15.8
Household furnishings	48	18.5	15	8.5	none	10
Jewelry	25	25	10	30	none	10
Machinery	20	40	15	15	none	10
Mill Work	45	25	5	5	5	10 (Delivery 5)
Paint	64.4	17.6		11.5	2	4.5
Paint, industrial	55	15	15	10	1	4
Paper products	53	12	16	11	none	9
Safety equipment	40	22	14	12	none	12
Steam boilers	25	10	15	19	22	9
Trucks	39	6	20	7	25	3

APPENDIX V.

Cost Accounting Theory and Practice (1924) J. L. Dohr, M.S., LL.B., C.P.A.

P. 39. *"The Elements of Sale Price.* The selling price of the article is then made up of the following items:

Direct Materials } Prime
Direct Labor } Cost } Factory
Burden } Cost } Cost to Make
Selling Expense } and Sell }
Profit } Selling Price"

Pp. 232-233. *"Quoting Sales Prices.* When the sales department is called upon *to establish* or quote *prices* on the finished product, *one of the most important factors* to be considered is *factory cost.* It must always be remembered that this factor alone cannot be used in fixing the sales price because other factors influence the problem. In a competitive business the prices fixed by competitors must be regarded, but the cost of manufacture is always an important element.

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"In addition, however, it is necessary *in establishing prices,* to consider several other factors. *To the factory cost must be added the appropriate container cost* dependent upon the kind of container the customer desires. Figures on container costs must, therefore, be made available to the sales department. If the price is to include *out-freight* (which is not paid by the customer as a separate item) the traffic department will be called upon to establish the proper freight rate to the customer's factory. *An addition*

must also be made to cover the selling and administrative cost, and some analysis of these items must be made to determine the amounts to be added to the factory cost for covering such expense. ***Finally, the desired amount of profit must be added*** to enable the company to pay dividends on its stock and interest on its borrowed capital (when not considered a part of cost), provide funds for extensions and improvements, and provide a reserve for losses in periods of depression." (Italics supplied.)